such circumstances the land court found that it would be inequitable to enforce the restrictions so far as they prevented the erection of apartment houses or buildings for business purposes, but that the removal of the restrictions would result in material damage to those who had already built. Accordingly it registered the title free of the restrictions under the statute. The Supreme Court, reaffirming what is now the established doctrine in Massachusetts, held that the restrictions created real rights in the dominant owners, and as a consequence held that the statute, applied to such a case, deprived the latter of rights in real property for a private use contrary to the Bill of Rights.

Here the original purpose could be carried out for the protection of the houses already built. True the tract was not developing as fast as had been hoped because of supervening events. In consequence, a greatly increased burden was put upon the servient owners, which might be material upon a question of specific performance, but had no relevance upon a question of property. Once the latter view is taken, the decision reached is inevitable. Had the change of condition been such that the original purpose could no longer be carried out, no special statute would be necessary to permit registration of the title free of restrictions that no longer exist. To do so would be no more than removing a cloud cast by the recorded restrictions. Moreover if the tract in question was needed for business purposes for the proper development of the city and the restrictions resulted in the tract remaining vacant and useless, a statute permitting registration of title free of the restrictions upon compensation in order to permit the only practicable use of the land and thus make it available for the general good might be sustained.[18] However this may be, the statute in the present case proceeded on no such theory. It sought to allow the servient owners to relieve themselves of an irksome burden by compelling the dominant owners to make an involuntary sale and raises a strong suspicion of having been made to order for this very case.

IMPAIRMENT OF CONTRACTS BY MUNICIPALITIES. — It has long been settled that municipal legislation may be state action within the constitutional provision forbidding laws impairing the obligations of contracts.[1] It is also decided that some municipal action does not come within the clause.[2] A mere breach of contract by a municipal corporation does not raise a federal question.[3] Two recent decisions by the Supreme Court of the United States are of value in indicating the lines of demarcation between these two positions and, by the dissenting opinions, in showing the reasons for the judicial confusion of mind on the subject.[4] In both of

[18] Clark *v.* Nash, 198 U. S. 361 (1905); Strickley *v.* Mining Co., 200 U. S. 527 (1906). But see Salisbury Land Co. *v.* Commonwealth, 215 Mass. 371, 379, 102 N. E. 619 (1913).

[1] Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1.

[2] St. Paul Gas Light Co. *v.* St. Paul, 181, U. S. 142.

[3] McCormick *v.* Oklahoma City, 236 U. S. 657.

[4] Cincinnati *v.* Cincinnati & Hamilton Traction Co. and the Ohio Traction Co., 38 Sup. Ct. Rep. 153.

The Northern Ohio Traction & Light Co., and the Cleveland Trust Co. *v.* the State of Ohio, 38 Sup. Ct. Rep. 196.

these cases there had arisen a dispute as to the duration of the franchises, in the first as to part only. The municipal authorities wishing to reduce the rates and make further regulations directed, in the first case by an ordinance of the city council, in the second by resolution of the board of county commissioners, that the companies make the required reductions and changes or remove their tracks, and required the corporation counsel and prosecuting attorney respectively to take legal action in case of noncompliance. In the first case the ordinance further stated that continued operation would be considered an acceptance of the ordinance.

While in some cases a distinction has been made between resolutions and ordinances on the ground that only the latter are legislative,[5] the Supreme Court has expressly refused to make decisions as to impairment turn upon this point.[6]

The difficulty in these cases arises from the fact that both legislative and administrative powers are vested in city councils and county commissioners, and because it is only when acting in their legislative capacity that their acts can conflict with the constitutional prohibition. Thus an ordinance directing the city treasurer not to pay out money under an alleged contract was held to be an administrative act, and since the only question involved was the validity of the contract, it was for the state and not the federal courts.[7] But an ordinance directing the mayor to notify a water company that the city was under no further liability on an alleged exclusive contract, and ordering an election to authorize the issuance of bonds for a city water plant, was held to be a law impairing the contract, since the city could point to no inherent want of legal validity in it.[8] It is not strange that the authorities are confused as to just where the line should be drawn. The nearest approach to a formulated test in the cases is whether the law deprives one of the benefit of a contract or imposes new duties or liabilities.[9] But such a test is little better than a restatement of the difficulty. Thus if a city repudiates an alleged contract with a water company giving it exclusive rights, and undertakes to build a water-plant itself, this is a law which may impair the contract.[10] Whereas if the city simply denies the contract, or repudiates an award made to one contractor, and gives it to another, there is no federal question.[11] It is submitted that in one case as much as in the other the law aims to deprive the plaintiff of the benefit of his claimed contract, and in neither does it add new duties or liabilities. Such a test loses sight of the real basis of distinction, the difference between administration and legislation. It would seem more helpful to suggest that the line is drawn between those ordinances whereby a municipal corporation attempts to force its will upon the other party by reliance upon its

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[5] Chamberlain *v.* Evansville, 77 Ind. 542, 551.

[6] Des Moines *v.* Des Moines City Ry. Co., 214 U. S. 179.

[7] St Paul Gas Light Co. *v.* St. Paul, 181 U. S. 142.

[8] Vicksburg Waterworks Co. *v.* Vicksburg, 185 U. S. 65.

[9] Northern Pacific Ry. *v.* Duluth, 208 U. S. 583, 591.

[10] Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1; Knoxville Water Co. *v.* Knoxville, 189 U. S. 435; Mercantile Trust Co. *v.* Columbus, 203 U. S. 311.

[11] McCormick *v.* Oklahoma City, 236 U. S. 657; Dawson *v.* Columbia Trust Co., 197 U. S. 178; Shawnee Sewerage & Drainage Co. *v.* Stearns, 220 U. S. 462.

sovereign powers of coercion and those where it takes the lawful processes open to any legal person. So where, under a claim that the contract with the company permits it, a city attempts to lower the rates of a public utility, there is uniformly held to be a law impairing the obligation of the contract;[12] also where, having given an exclusive franchise, it repudiates it and attempts to compete itself,[13] or to give a franchise to another.[14] The city here representing the sovereign is using its powers to take away a grant which only sovereign power can give or take away. A striking illustration of this occurred when a city attempted to withdraw a franchise right to double track, and the mayor ordered the arrest of anyone attempting to work on the line.[15] But a city may exercise the legal power which any individual or corporation has to break a contract without violating the federal constitution.[16] Otherwise, if all refusals of its agents to perform were void, every contract would be specifically enforceable against it, so it may allow a claim for the use of hydrants, but deny that the money is paid under a contract for future use, since that is a mere statement of position to prevent estoppel.[17] It may refuse to take action after having given a franchise which promised an affirmative raise in rates every six months, because this merely withdraws its sanction of the raise, and, although a breach of contract, does not prevent the company charging reasonable rates.[8] Also, after giving an exclusive franchise to a water company, excepting the right to license owners contiguous to the river to lay pipes for private use, it may permit an owner separated from the river by land of the city to lay pipes across its land, since this, although a breach of contract, is merely an administrative act.[19] Finally, it may in case of a dispute in regard to a franchise order the removal of tracks from the street and direct the city council to take the proper legal action to enforce the order, but only because it clearly appeared that the attorney did not intend to "take a posse and begin to pull up the tracks."[20] Obviously the ordinance in substance was only a statement of the city's claim and a direction to the attorney to test it in the courts. This is an administrative act open to any individual.

The ordinance and resolutions of the principal cases, however, provided for a reduction of the rates with an alternative threat of legal

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[12] Detroit *v.* Detroit Citizens' Ry. Co., 184 U. S. 368; Cleveland *v.* Cleveland City Ry. Co., 194 U. S. 517; Los Angeles *v.* Los Angeles City Water Co., 177 U. S. 558.

[13] Cases cited under note 10, *supra*.

[14] City Ry. Co. *v.* Citizens' Street R. Co., 166 U. S. 557.

[15] Grand Trunk Western Ry. Co. *v.* City of South Bend, 227 U. S. 544.

[16] Cases under notes 2 and 11, *supra*. But see two cases in the lower federal courts which seem irreconcilable with the above authorities. American Waterworks & Guarantee Co. *v.* Hume Water Co., 115 Fed. 171; Riverside & Q. Ry. Co. *v.* Riverside, 118 Fed. 736. In the latter case the city had contracted to supply the railway company with electricity at a given rate. It passed an ordinance notifying the company that it would not go on at that rate. The court held it a law impairing the obligation of the contract. It is submitted that this is merely a default upon a contract such as any private company might make, and that the proper remedy, if any, should have been an action for breach of contract.

[17] Defiance Water Co. *v.* Defiance, 191 U. S. 184.

[18] Southern Bell Tel. & Tel. Co. *v.* Birmingham, 211 Fed. 709.

[19] New Orleans Waterworks Co. *v.* La. Sugar Refining Co., 125 U. S. 18.

[20] Des Moines *v.* Des Moines City Ry. Co., 214 U. S. 179. But see Owensboro *v.* Cumberland Telephone & Tel. Co., 230 U. S. 58.

action to eject the companies from the streets. The alternative by itself, as was seen above, would not have offended against the constitution. But the order to reduce the rates was not a mere statement of the city's claim to have such a right with a direction to litigate it. It was an attempt to exercise the coercive power to reduce rates. The alternative was an alternative only in words. As was pointed out in *Detroit* v. *Detroit Citizens Ry.*,[21] the law would have been practically self-enforcing, since the public would have refused to pay more than the new rate until the companies had established their rights at law. In the case above the city only claims the right to order a removal, though actually ordering it in form; in the principal cases the city orders a self-enforcing reduction, though in form only claiming the right. Clearly this is a law impairing the obligations of the franchises.

THE NATURE OF RIGHTS INVOLVED IN AN OIL AND GAS LEASE.—When the owner of a tract of land grants to another the exclusive right to explore and drill for oil and gas on his land, and, if the same be found in paying quantities, to remove it, in consideration of the payment of a royalty, which is generally a certain proportion of the mineral itself, there exists what is commonly known as an oil and gas lease. The determination of the nature of this so-called lease, and of the rights of the parties thereto, has occasioned much diversity and confusion of language on the part of the courts in the states where oil lands are to be found. It is proposed to discuss here the situation which exists when the right of the lessee, which is contingent on the discovery of the mineral, vests, by oil and gas being produced in paying quantities.

First of all it is important to notice what the right of the owner of the land is in the oil and gas beneath his land before he makes the lease. Although for many purposes his right is like a property right, he is not, strictly speaking, the owner of the oil and gas beneath the land, but merely has an exclusive right to drill for it and to reduce it to possession, at which time he gets title to it. The reason for the distinction between a landowner's right to oil and gas and his ownership in solid minerals like coal lies in the "vagrant and fugitive" nature of oil and gas which causes it to flow from one tract of land to another, and makes it possible for the owner of one tract to exhaust the supply from beneath the surrounding land. The fact that the landowner has no ownership, or as many courts put it, has but a qualified ownership in oil and gas not reduced to possession, has been most clearly recognized in cases involving the constitutionality of statutes prohibiting the wasting of one of these fluid minerals in the process of extracting another from the ground. The United States Supreme Court has held that such statutes are not a taking of the surface owner's property without due process of law, because he has no property in the mineral until it is reduced to possession.[1]

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[21] 184 U. S. 368, 379.

[1] Ohio Oil Co. *v.* Indiana, 177 U. S. 190; Lindsley *v.* Natural Carbonic Gas Co., 220 U. S. 61. For a discussion of these cases and of the rights of a landowner in underlying oil and gas, see a note in 25 HARV. L. REV. 76.